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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128 DA 97-2214

OPPOSITION OF THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL TO MCI'S MOTION FOR STAY PENDING JUDICIAL REVIEW

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November 20, 1997

No. of Copies rec'd 0+4
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Client No. A5691.543

TABLE OF CONTENTS

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CLIENT # A5691.543

SUMMARY

It is outrageous for MCI to seek a stay of the Second Report and Order. A comprehensive federal payphone compensation scheme, compensating payphone service providers ("PSPs") for all types of "dial-around" calls -- "subscriber 800" as well as access code calls -- should have been in place more than five years ago. Instead, due to interexchange carriers' ("IXCs'") intransigence and the Commission's legal error, the infant independent payphone industry has struggled for survival without any compensation for some 90% of dial-around calls -- a category that represents 20% of average payphone calling volume. After Congress affirmed that compensation must be comprehensive and established a statutory deadline of November 8, 1996, the Commission worked diligently to prescribe compensation by the due date, only to have the first plan vacated by the court of appeals. Now, more than a year *after* the Congressional deadline, MCI is trying to delay compensation yet again, in order to prolong even further its "free ride" on payphones that have originated hundreds of millions of dollars of revenue for IXCs.

In these circumstances, a stay is indisputably both inequitable and unlawful. It is fundamental that when companies are compelled to allow use of their facilities, they are entitled to timely payment for such use. Furthermore, to interrupt the compensation scheme one year after the scheme was required to be in place would be patently inconsistent with the Congressional mandate.

A stay would also irreparably harm the independent payphone industry. Most PSPs have no source of revenue except their earnings from their payphones. Dial-around

compensation -- covering 20% or more of payphone calls -- cannot be interrupted twice without fundamentally undermining investor confidence in the industry.

As for MCI's own showing of irreparable harm, it is virtually absent. MCI cannot be harmed because it is already passing on a compensation charge to its own customers. Further, IXCs will not have to pay compensation until April, and in any event the injury they would suffer from *payment* of compensation on a tiny fraction of their call volume cannot come close to the injury that independent PSPs would suffer from *non-payment* of compensation on 20% of their call volume. As to injury to customers, there is no evidence that any customer feels so injured by compensation as to request blocking of dial-around calls, and even if some customers did, MCI could avoid injuring those customers by blocking, for those customers, the more than 60% of payphones that can already be blocked by IXCs, and waiving its pass-through charge for calls originating from those payphones that cannot be blocked.

As to the merits, MCI's sketch of its disputes with the FCC's order is far from persuasive -- and fails to demonstrate either that the order is likely to be remanded *or* that the net result of the remand (after the challenges of APCC and other parties from the other side are addressed) is likely to be a reduction in the rate. MCI misreads the force of the court of appeals ruling as disapproving a market-based approach. Further, MCI incorrectly accuses the Commission of omitting to address profits as well as costs in its analysis. It was entirely appropriate for the Commission to consider independent payphone industry data, as well as other data. Indeed, the independent industry is the best data source because, among other reasons, it is the segment most likely to serve marginal payphones. Finally, MCI cannot fault the Commission for declining to consider MCI's "study" submitted two days before the decision, or USTA's cost revisions submitted 14 days after the decision.

In short, MCI's request for stay is utterly insufficient as a matter of law and equity.

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OPPOSITION OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
TO MCI'S MOTION FOR STAY PENDING JUDICIAL REVIEW

The American Public Communications Council ("APCC") hereby opposes the motion of MCI Telecommunications Corporation seeking a stay of the Second Report and Order in this proceeding, FCC 97-371, released October 7, 1997, pending judicial review.

STATEMENT OF INTEREST

APCC is a national trade association of some 2,000 independent (non-local exchange carrier) payphone service providers ("PSPs"). APCC's membership also includes equipment manufacturers, suppliers, and service providers serving the payphone industry. For the last eight years, APCC has actively participated in federal legislative and regulatory proceedings in order to ensure fair compensation of payphone providers for the use of their payphones.

BACKGROUND

In seeking a stay of the Commission's Second Report and Order, MCI is seeking to prolong its "free ride" and to further delay fair payphone compensation which already has been delayed for seven years.

Since at least 1990, payphone service providers have been compelled to deliver to interexchange carriers ("IXCs") all calls dialed from their payphones with access codes or "subscriber 800" numbers. 47 U.S.C. § 226(c).[1] Such "dial-around" calls generate hundreds of millions of dollars in revenue annually for IXCs. Yet, from the introduction of competitive payphones more than ten years ago, IXCs have steadily resisted paying compensation for the use of payphones to make these calls. In 1990, Congress required the Commission to consider prescribing compensation for independent PSPs[2] for originating dial-around calls. 47 U.S.C. § 226 (e)(2). The FCC, in 1992, required that the IXCs compensate independent PSPs at a rate of $.40 for each interstate access code call,

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1 Section 226(c) expressly requires unblocking of "access codes." Access codes include specialized dialing sequences such as 10XXX, 101XXXX and 950-XXXX, as well as hundreds of "800" numbers such as 1-800-CALL-ATT and 1-800-COLLECT, which enable the caller to reach a carrier's calling platform for "operator-assisted" calls. "Subscriber 800" numbers include all other "toll-free" 800 (and 888, 877, etc.) numbers such as 1-800-FLOWERS, airline and hotel reservation numbers, and the like. Because it is impractical for a payphone to differentiate the large and ever-increasing class of "access" 800 numbers from the remaining "subscriber" 800 numbers, payphone providers were compelled to allow free calling to all 800 numbers. Calls to access code and subscriber 800 numbers are known in the payphone industry as "dial-around" calls because they are not subject to the commission arrangements negotiated between the payphone provider and its presubscribed service provider(s).

2 Compensation for use of LEC payphones was not addressed at this time because LEC payphones were still part of the rate base and LEC payphone costs were fully recoverable from regulated revenue requirements, including access charge subsidies.

on an assumed base of 15 calls per payphone per month. Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Second Report and Order, 7 FCC Rcd 3251 (1992). However, the FCC erroneously ruled that it was not authorized to prescribe any compensation for subscriber 800 calls. While that ruling was on review, the volume of subscriber 800 and access code calls increased dramatically, reaching an estimated 131 calls per payphone per month by 1996. Thus, independent PSPs were effectively uncompensated for almost 90% of their total volume of dial-around calls. In 1995, the court of appeals ruled that the FCC had erred in interpreting its statutory authority and remanded the case to the FCC to correct its error. Florida Public Telecommunications Ass'n v. FCC, 54 F.3d 857 (D.C. Cir. 1995) ("FPTA").

Before the FCC could act on the 1995 remand, Congress enacted the Telecommunications Act of 1996. Congress explicitly directed the FCC to expand its deficient compensation plan, and to "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A). The Commission was also required to terminate the existing access charge subsidies for LEC payphones and to incorporate LEC payphones into the new compensation plan. Id., § 276(b)(1)(B). Congress required the Commission to complete "all actions necessary" to establish the new compensation plan within nine months after the date of enactment, or by November 8, 1996. Id., § 276(b)(1).

The Commission acted diligently and expeditiously to complete the compensation plan within the prescribed deadline, and the new compensation plan took effect for independent PSPs on November 8, 1996.[3] Under the new plan, IXCs were required to compensate PSPs for subscriber 800 and access code calls at a market-based rate of 35 cents per call, for the first two years, and subsequently at a "default" rate equal to the deregulated rate for local coin calls.[4]

With this FCC decision, it appeared that the statutory mandate of Section 276 had been fulfilled, ending the IXCs' six-year "free ride" in which independent PSPs went uncompensated for 90% of the dial-around calling from their payphones. In decisions issued July 1, 1997 and September 16, 1997, this Court vacated and remanded the compensation plan for further consideration by the Commission. Illinois Public Telecommunications Association v. FCC, 117 F.3d 555 (D.C. Cir. 1997)("IPTA"), Supplemental Opinion, 123 F.3d 693 (D.C. Cir. 1997)("IPTA Supp."). The Court concluded that the Commission had not justified setting the compensation rate equal to the local coin calling rate. Noting that the Commission had found that the costs of local coin calls and subscriber 800 and access code calls are similar, the Court faulted the

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3 With respect to LECs, the regulations were completed by November 8; but LECs were allowed five months, or until April 15, 1997, to complete the removal of access charge subsidies and switch to the new compensation plan.

4 Because carriers had not yet deployed the capability to track all compensable calls, the Commission's plan further provided that, in the first year of the two year interim compensation period, payphone service providers would be compensated at a flat rate of $45.85 per payphone per month, based on 35 cents times the estimated average volume of 131 access code and subscriber 800 calls per payphone per month. Carriers with more than $100 million annual toll revenues were to contribute shares of the $45.85 per phone payment based on their shares of the overall toll market.

Commission for failing to address evidence in the record indicating that the costs of the calls are not similar. July 1 Opinion, 117 F.3d at 563-64.[5]

By vacating the FCC's decision, the court of appeals voided the obligation to pay compensation that had been established by the Commission. As a result, some IXCs have reduced their payments to reflect their own unilateral assessment of a "fair" amount. MCI, for example, is currently paying at a flat rate of $2.52 per payphone per month -- less than 30% of its required flat-rate payment under the Commission's initial order. The rest have stopped paying any compensation at all. Meanwhile, the major IXCs are billing *their* customers at the full amount of the Commission's prescribed compensation rate.

On remand, the Commission acted diligently to re-prescribe a dial-around compensation rate, which became effective October 7, 1997. The new rate is 6.6 cents *less* than the vacated rate:[6] a uniform 28.4 cents per call for the first two years, and subsequently 6.6 cents less than the local coin rate at each payphone.

I. LAW AND EQUITY PROHIBIT GRANT OF A STAY

It is outrageous that MCI seeks a stay of the compensation rules. As explained above, a comprehensive dial-around compensation plan *should have been in effect more than five years ago*. Instead, due to IXC opposition and a legal error, the independent payphone

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[5] The Court did *not* reject the Commission's adoption of a market-based approach to setting compensation rates. Indeed, it specifically affirmed the Commission's reliance on market forces to determine fair compensation for local coin calls. Id. at 563.

[6] The new rate is *more than ten cents less* than the 40-cents-per-call dial-around rate established by the Commission in 1992.

industry had to struggle for survival without any compensation for some 90% of dial-around calls. After Congress expressly affirmed that compensation must be comprehensive and established a statutory deadline, the Commission worked under tremendous time pressure to meet the November 8, 1996 due date, only to have the compensation plan vacated by the court of appeals. Now, more than a year *after* the deadline, MCI is trying to have the compensation plan interrupted yet again, seeking to prolong even further its years of successfully avoiding payment for a service that has generated hundreds of millions of revenue dollars for MCI.

In these circumstances, a stay indisputably would disserve the public interest. It is fundamental that companies compelled to allow use of their facilities are entitled to timely payment for such use, even though the exact amount of the payment may be disputed. Lincoln Tel. & Tel. Co., 45 RR 2d 1553, 1557 (1979), aff'd, Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092, 1108 (D.C. Cir. 1981). A stay would leave MCI and other IXCs free to receive calls without making any payment whatsoever -- an illogical and patently inequitable result.

Indeed, it is unlawful to grant a stay, given the clear Congressional mandate that compensation be in place as of November 8, 1996. 47 U.S.C. § 276(b). Granting a stay would deny PSPs any right to collect compensation pursuant to Section 276 until the court of appeals has ruled on the merits of MCI's petition for review. In other words, there would be no compensation plan in place more than one year *after* the Congressional deadline. Granting a stay is simply inconsistent with Section 276, and with the principle that telecommunications companies are entitled to timely payment for services provided.

Furthermore, a stay would irreparably harm the independent payphone industry. The vast majority of independent PSPs have no source of revenue except what they earn from their payphones. Dial-around compensation represents some 20% or more of a typical payphone's calling volume. APCC Comments, Att. 4. In this telecommunications industry segment, which is struggling through a variety of changes, including the Section 276 restructuring, there is already a good deal of instability. Coin revenue alone is generally not adequate to meet costs, and operator service commission revenue has steadily declined as operator service calls are supplanted by "dial-around" calls.

The previous interruption, by Court mandate, of the Commission's dial-around compensation plan caused major tremors in the financial markets serving this industry -- especially with respect to the largest four payphone companies, which are publicly traded. Indeed, a pending merger between two of those companies had to be called off after the Court's ruling. A second interruption of the compensation plan would even further undermine investor confidence, and would certainly put on hold any plans for "widespread deployment of payphone service." 47 U.S.C. § 276(b).

It is important to recognize that there is a substantial time lag between the setting of the rate and the collection of compensation under that rate.[7] Thus, even though

[7] Compensation is currently paid on a quarterly basis. Before paying compensation, carriers have required an accurate count of each provider's payphones, a process that typically has delayed payment for a minimum of 3-6 months.

the Commission reinstated compensation effective October 7, 1997, IXCs do not intend to pay compensation under the new scheme until April 1998. If a stay is granted, it would take several months *after* the plan is reestablished in effect, before PSPs would begin receiving payments under the reestablished scheme. Meanwhile, PSPs would continue to go without any compensation except what individual IXCs unilaterally chose to pay. Contrary to MCI's suggestion, moreover, even after the correct amount of compensation is "finally final," whenever that may be, there is no guarantee that IXCs will not claim that such compensation can apply only prospectively and should have no retroactive effect.

Against all these legal and equitable reasons to deny a stay, MCI fails to make any serious affirmative showing of irreparable injury. MCI wisely does not even attempt to show irreparable injury on its own account, because *MCI* and *other major IXCs have all filed tariffs raising rates to recover the compensation payments from their customers.* APCC Comments, Attachments 5-15. Instead, MCI asserts injury to its customers and to unnamed "newer, smaller interexchange carriers." However, there can be no danger of irreparable injury to any carrier at this time because, as noted above, compensation payments are not even due until April 1998. Further, even if there were some error in the Commission's current calculation of compensation (see below), carriers would not be significantly injured, because most have yet to pay *any* compensation for any period subsequent to December 31, 1996. Thus, even if IXCs were subject to an overpayment, most have already underpaid for almost a year.

Finally, unlike PSPs, no carrier has shown that compensation payments represent a significant percentage of their revenue. Any carrier is far better able to finance its compensation payments, then PSPs are to withstand compensation non-payment.

As to customers, MCI and other carriers have a simple solution. If any customer is suffering undue financial hardship from paying compensation pass-through charges, the carriers can simply waive the recovery of the payment from that customer until such time as permanent compensation is established. They do not have to go to the Commission or the Court to obtain permission to provide this relief.

Finally, MCI alleges that customers that object to paying compensation pass-through charges will not be able to block calls from payphones, as contemplated by the Commission's rules, because the blocking mechanism is not in place. MCI has yet to identify a single customer that has requested. Furthermore, blocking is in place for at least 60% of payphones. For the remaining payphones, blocking is not in place only because IXCs and LECs have failed to coordinate their efforts and instead have chosen to wage a legal battle over interpretation of the ANI digit requirement of the Payphone Order. MCI should not be heard to complain, and independent PSPs should not suffer, because MCI and other carriers have dragged their feet on implementation of Commission requirements. In any event, to the extent blocking is not in place, then MCI has a simple remedy: it can forego passing on compensation charges to customers that request blocking from payphones that cannot be blocked, and recover these costs elsewhere. Since there is no reason to believe that a significant number of customers (if any) will request blocking, there is absolutely no basis for finding irreparable injury to any customer.

II. MCI IS UNLIKELY TO PREVAIL ON THE MERITS

Having failed to show any irreparable injury that could possibly outweigh the inequities of a stay, MCI relies on its argument that it will prevail on the merits. Most of these arguments are merely sketched in MCI's motion. They amount primarily to disputes over the manner in which the FCC calculated the new compensation rate. APCC also has disagreements with the manner in which the FCC calculated the new rate. Nothing in MCI's Motion comes close to demonstrating that MCI will prevail on the merits of its disputes, or even if it did, that the "overcharges" will net out to more than the "undercharges" to be asserted by APCC and other parties.

A. The Commission Fully Addressed The Court Of Appeals' Ruling And Justified The Use Of A Market-Based Approach

Noting that the Commission's first compensation rule was vacated by the court of appeals, and arguing that the court did so because it found "little or no prospect of the rule's being readopted upon the basis of a more adequate explanation of the agency's reasoning," MCI claims that the Commission has essentially readopted its original rule. Motion at 4-5. This claim is patently wrong. The Commission's original order prescribed a compensation rate equal to the local coin rate (or an initial rate of 35 cents). The Second Report and Order prescribes per call compensation of 6.6 cents *less than* the local coin rate (or an initial rate of 28.4 cents). The 6.6 cents reduction may be small change to MCI, but

APCC assures the Commission that it makes a very big difference to independent payphone service providers ("PSPs").

MCI also contends that, in light of the court of appeals decision, the Commission on remand failed to offer sufficient additional justification for using market-based local coin rates as a benchmark for setting the per-call compensation rate. Motion at 5. This contention misreads the court's decision. The court's opinion did not disapprove the use of market-based local coin rates as a benchmark. The *sole* basis on which the court remanded the FCC's original compensation rate, was that: (1) the FCC's only justification for setting the dial-around rate equal to the local coin rate was that the costs of dial-around calls and local coin calls were similar; and (2) the FCC failed to address record evidence indicating that the costs of the two types of calls are not similar. 117 F.2d at 563-64. Therefore, the FCC on remand conducted additional analysis to determine the difference in the costs of the calls and to ensure that the difference is reflected in the compensation rate. The Commission also went further -- for example, considering evidence as to relative elasticity of demand and as to the total costs attributable to dial-around calls. Although APCC disagrees with some aspects of the Commission's analysis, the overall analytic approach was entirely appropriate to address the flaws identified in the court's opinion.

MCI also contends that the FCC incorrectly assumed that the market for local coin payphone calling is the same as the market for access or long distance calling. However, MCI does not explain what it means by this. As noted above, the FCC considered evidence as to relative elasticities of demand, but found the evidence inconclusive.

MCI also contends that "the market rate approach assumes, without foundation, that the local coin rate effectively reflects a negotiated rate between equally powerful market participants." MCI at 6. MCI cites no theory or other evidence to support its notion that market participants must be "equally powerful" in order to have an effective market. In any event, the court of appeals specifically upheld the FCC's finding that the market forces in the payphone market would function well enough to keep local coin rates at a reasonable level. IPTA at 12.

B. The Commission Did Consider Profits

MCI also faults the Commission for subtracting from the local coin rate only the net difference in the *costs* attributable to local coin calls and dial-around calls, without also subtracting the alleged difference in the amount of *profit* that should be attributed to the two types of calls. In fact, the Commission *did* include profits in its analysis of the cost differential between local coin calls and dial-around calls. See Second Report and Order, ¶ 53, n. 139 (finding a differential of $12.46 per month, or 3.2 cents per call, in investment costs for coin vs. non-coin payphones, *including* depreciation *and* return on investment). Thus, contrary to MCI's claim, the 6.6 cents *is* a "cost+profit" figure.[8] There

[8] MCI attempts to bolster its argument by developing a fallacious "super profit" theory based on a cost figure of 16.7 cents per call. But the Commission properly discounted this cost "datum," from a New England Telephone study that was submitted to the Massachusetts PSC for a different purpose. That study was never submitted in the record and the out-of-context number extracted from it was given no weight for a host of
(Footnote continued)

is no validity to MCI's contention that the Commission's approach overallocated profit to dial-around calls.

C. It Was Reasonable For The Commission To Rely On APCC Data

MCI also faults the Commission for relying on APCC's data concerning costs and the average number of calls from a payphone. In fact, the Commission also utilized cost data from other parties, such as AT&T. As for LEC data, the Commission properly excluded the New England Telephone figure cited by a number of parties, for the reasons stated above. The Commission considered data submitted by Sprint in its reply comments, but gave it limited weight because it was not representative of the cost structures of independent payphone providers.

Further, contrary to MCI's claim that independent PSPs are "inefficient" and "unrepresentative" of the payphone industry, the undisputed record shows that independent PSPs have repeatedly stepped in to serve unserved low-income and rural areas, while LECs have retreated from these areas and shrunk their payphone base. It is *precisely* the independent PSPs who represent the best prospect of service to marginal payphone locations.

(Footnote continued)
sound reasons. See APCC Reply Comments at 17-23. The most reliable figures are those from independent PSPs, showing that dial-around costs arein the neighborhood of 35-40 cents per call. Based on these more reliable figures, there is no extra profit to allocate among calls.

MCI argues that LECs should not be rewarded for failing to submit cost data. By the same token, however, independent PSPs should not be *penalized* for any alleged deficiencies in LEC participation in the proceeding. MCI at 11, n. 4. Independent PSPs submitted substantial cost data, much of it from publicly traded companies, and the Commission found that data credible. Whether or not a lack of LEC data could possibly warrant granting a stay as to LECs, there can be no basis for preventing independent PSPs from collecting in a timely manner compensation that is long overdue and that is fully justified based on independent PSPs' costs.

MCI also raises miscellaneous other claims, such as a "study challenging the Commission's premise that a higher per-call compensation rate would promote Congress's goal of widespread deployment of payphones." MCI at 12. Since MCI submitted no studies in its comments or reply comments, APCC assumes that MCI refers to the last-minute ex parte submission of October 7, 1997. This submission, which in any event, is full of illogical conclusions based on unsupported assumptions, was not entitled to consideration. The "study" was submitted only two days before issuance of the decision, well after the close of the comment cycle, and there was no opportunity for any party to respond. It is improper to fault the Commission for failing to consider a last-minute ex parte submission.[9]

[9] Indeed, the APCC believes it should be stricken from the record. The late filing was not accompanied by any justification, such as changed circumstances or newly discovered facts. See 47 CFR § 1.429(b).

MCI also argues that the Commission's estimate of ANI digit costs (amounting to one cent per call) is incorrect. Motion at 12-13. While APCC agrees that, based on the October 24 USTA letter, the total estimate of $600 million is inflated, correction of the error cannot change the compensation rate by more than a penny. Further, the Commission committed an offsetting error by dividing the total by the number of payphone calls rather than by the number of dial-around calls. When this offsetting error is corrected, there may be no net change in the one cent per call estimate. In any event, a petition for reconsideration is the appropriate place to address the revised USTA submission, which was filed after the release of the Second Report and Order.[10]

CONCLUSION

In short, MCI's request for stay is utterly insufficient as a matter of law and equity.

Dated: November 20, 1997

Respectfully submitted,

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[10] Unlike the study discussed in the preceding paragraph, the USTA revision may reasonably be raised on reconsideration because MCI could not be expected to know of it during the comment cycle.

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on November 20, 1997, I caused a copy of the foregoing Opposition Of The American Public Communications Council To MCI'S Motion For Stay Pending Judicial Review to be sent by first class mail, postage prepaid or by hand delivery (*), to the following:

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